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No. 94-478

In The

Supreme Court of the United States

October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY

REQUEST FOR JUDICIAL NOTICE

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ATTORNEYS FOR RESPONDENT
MINNESOTA MUTUAL LIFE
INSURANCE COMPANY

October 11, 1994

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF MINNESOTA MUTUAL LIFE INSURANCE COMPANY

Respondent Minnesota Mutual Life Insurance Company (hereinafter "Minnesota Mutual") hereby submits its Opposition to Petitioner's Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

Petitioner's claim against Respondent Minnesota Mutual involves only state law claims in which this Court can have no interest, namely the application and interpretation of a suicide exclusion in a life insurance policy. There is a distinct and meaningful difference between Respondents Minnesota Mutual and Metropolitan Life Insurance Company. The Metropolitan Life Insurance Policy involved herein was and is part of an Employee Benefit Plan and is governed by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq. Minnesota Mutual's policy of insurance is not part of an employee benefit plan and has never been considered so. It is not governed by ERISA and there has

never been any claim or even suggestion that ERISA had any applicability whatsoever to Minnesota Mutual. This case was removed to District Court on behalf of Minnesota Mutual solely on the basis of diversity of citizenship (Minnesota and California) and amount in controversy. Therefore, the bulk of the Petition for Writ of Certiorari, which deals with ERISA matters, is not applicable to Minnesota Mutual.

THERE ARE NO VALID REASONS FOR GRANTING THE PETITION AS TO MINNESOTA MUTUAL

I. THE CASE BETWEEN PLAINTIFF AND MINNESOTA MUTUAL INVOLVES ONLY THE APPLICATION OF STATE LAW (CALIFORNIA) TO THE PARTICULAR FACTS AND CIRCUMSTANCES OF PLAINTIFF'S CLAIM. THERE IS NO BASIS FOR THE APPLICATION OF FEDERAL STATUTORY OR COMMON LAW.

As conceded by Petitioner at page 6 of the Petition, the Minnesota Mutual policy was a group mortgage life insurance policy issued to Petitioner's

home mortgage lender, San Francisco Federal Savings. This policy paid a death benefit but excluded the benefit if the insured died by suicide, whether sane or insane, within two years of the effective date of the policy. The sole question in the case below was whether the death was by suicide. Both the District Court and the Ninth Circuit found that the death of plaintiff's insured, who killed himself by a single gunshot wound from a semi-automatic 22 with the muzzle placed in his mouth, was suicide.

The seminal case in California with respect to suicide is Searle vs. Allstate Life Insurance Company, 38 Cal.3d 425, 436, 212 Cal.Rptr. 466, 696 P.2d 1308 (1985). That case sets forth a two part burden on the insurance company to prove that the death of the

insured was the result of suicide. First, the insurer must prove that death was by self-destruction. In fact, as set forth in the Ninth Circuit Court of Appeals decision at page A-7 of the Petition "both parties agree that the death was an act of self-destruction, rather than an accident. It is undisputed that Mr. Tortuya got out of bed, took the gun out of his closet, went to the bathroom, put the rifle in his mouth, and shot himself."

Minnesota Mutual also proved the second part of the Searle test, which is that Mr. Tortuya committed the act with suicidal intent. As set forth in part in the Ninth Circuit Court of Appeals decision at page A-8 of the Petition, "defendant has pointed to overwhelming evidence to show that Mr. Tortuya understood the physical consequences of

the action he took, and therefore intended to commit suicide."

As the Ninth Circuit Court of Appeals unquestionably determined, Minnesota Mutual's case involves the application of Searle to the particular facts of this case and nothing more. The U.S. Supreme Court has no interest whatsoever in such state law issues.

Arguing that the insured's suicide was caused by medical malpractice, Petitioner has repeatedly urged various courts to apply the causation analysis normally applied only in first party property insurance cases to the life insurance context. All courts which have considered this argument have declined to do that. As noted by the Ninth Circuit Court of Appeals at page A-13 of the Petition "the California Supreme Court has never applied the

efficient proximate cause analysis to require the payment of benefits under a life insurance policy. 'Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state's highest court would resolve it.' (citations omitted)"

Because no California court has ever applied "efficient proximate cause", as petitioner terms it, to life insurance contract benefits, it can be safely predicted that no state court would apply this doctrine. Even if it were to be applied, that is a question of state law not federal law. This issue is thus not something meriting the attention of the Supreme Court of the United States of America.

Furthermore, there has now been a ruling by the U.S. District Court for the Northern District of California, in

an action being pursued by Petitioner against the Veterans Administration, that Mr. Tortuya's death was not the result of medical malpractice. See Respondent's Request for Judicial Notice. Hence there is no factual basis for an efficient proximate cause analysis, even there were a legal basis for making an argument.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner has alluded to none and there is in fact no conflict between different circuits of the United States Courts of Appeal on any matter relating to the dispute between petitioner and Minnesota Mutual. This is only logical as the dispute involves state law and not federal law.

III. THERE IS NO FEDERAL QUESTION INVOLVED

As noted above, as between

Petitioner and Minnesota Mutual there is no federal statute or federal common law involved.

IV. NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

This case is also well within the accepted and usual course of judicial proceedings, hence certiorari is inappropriate. As noted above, this case involved the application of established California law (Searle) to the particular facts of this case and the Ninth Circuit's refusal to go beyond the California Supreme Court in applying efficient proximate cause analysis. Such decisions can hardly be deemed to have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V. THERE IS NO CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT

Petitioner has cited no case and there is none. In fact, in the Petition under the heading "Reasons for Granting the Petition", there is not one reason given for this Court's exercise of jurisdiction with respect to Minnesota Mutual, a lawsuit not involving ERISA.

VI. THE PETITION MISSTATES THE FACTS AND LAW BELOW

Petitioner's efficient proximate cause argument is nothing more than an exercise in confusion. It ignores the plain words of the policy exclusion and the California Supreme Court's decision in Searle vs. Allstate Life Insurance Company, 38 Cal.3d 425, 436, 212 Cal.Rptr. 466, 696 P.2d 1308 (1985).

As conceded in the Petition, the Minnesota Mutual policy is a policy of life insurance. Hence, benefits are due

if a person dies while covered unless there is an applicable exclusion. Here Minnesota Mutual established that the policy exclusion for death by suicide, whether sane or insane, within two years of the effective date of the policy was applicable. The question to be answered is whether the death was by suicide, not what reason or reasons there might have been that led the deceased to commit suicide.

Petitioner urges that somehow the question of possible medical malpractice plays a role. To the contrary, Minnesota Mutual met its burden of proof as required by California law to establish that the deceased died as a result of an act of self-destruction which was committed with suicidal intent. Petitioner's argument that a death caused by medical malpractice was

not specifically excluded is meaningless. Any suicide is excluded whether caused by medical malpractice, mental illness, physical pain, despair or any of the other reasons that lead people to commit suicide. It is the mode of death, suicide, which governs, not the reasons causing the suicide. There is no requirement in the policy or in the law of litigating the reasons <u>why</u> someone committed an intentional act of self-destruction with suicidal intent. The only question is <u>whether</u> death was caused by an intentional act of self-destruction committed with suicidal intent.

The efficient proximate cause argument amounts to grasping at straws. By virtue of the U.S. District Court's decision in the malpractice action holding that there was no malpractice,

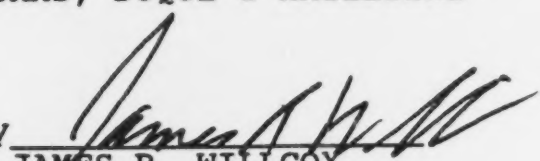
there is no longer any straw at which to grasp.

VII. CONCLUSION

The Petition for Writ of Certiorari as to Minnesota Mutual Life Insurance Company must be denied.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE

By 
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METROPOLITAN LIFE INSURANCE COMPANY
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RESPONDENT MINNESOTA MUTUAL'S REQUEST FOR JUDICIAL NOTICE

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ATTORNEYS FOR RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY

October 11, 1994

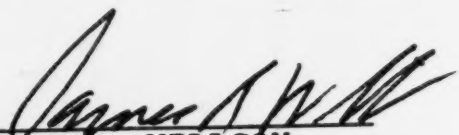
Pursuant to Federal Rule of Evidence 201, Respondent Minnesota Mutual Life Insurance Company hereby requests that the United States Supreme Court take judicial notice of the judgment in an action entitled Tortuya vs. United States of America, U.S. District Court Northern District of California, Action No. C 91-0338 BAC dated September 13, 1994. A true and correct copy of this Judgment is attached hereto.

Under Federal Rule of Evidence 201(f) "judicial notice may be taken at any stage of the proceeding." The above judgment was entered on September 15, 1994 and it was therefore impossible for Respondent to request that judicial notice be taken prior to that date. Judicial notice may be taken by an appellate court even where judicial

notice is raised for the first time on appeal, particularly when judicial notice is requested for the purpose of affirming the decision below. 21 Wright & Graham FEDERAL PRACTICE AND PROCEDURE "Evidence" at 525 (Section 5110).

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE

By 
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APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRESENCIA B. TORTUYA and CRISTETA TORTUYA, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. C 91-0338 BAC MEMORANDUM OPINION

BACKGROUND

This is a wrongful death action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, based upon the suicide of Gene Tortuya. The plaintiffs are his wife and mother who claim that Tortuya's

suicide was caused by the medical negligence of two Veterans Administration ("VA") staff psychiatrists.

FINDINGS OF FACT

1. Gene Tortuya was born September 26, 1948, in the Philippines. He came to the United States at age 19 and, shortly thereafter, entered the Navy for several years and received an honorable discharge in 1971.

2. Mr. Tortuya married Cresencia Tortuya, a licensed registered nurse in California, in 1966. That same year, he began working for United Airlines as an aircraft mechanic, where he was working at the time of his death.

3. Between 1980 and 1984, Gene Tortuya suffered symptoms of psychosis and was, on occasion, treated as an outpatient at the Brentwood Veterans

Administration Medical Center ("VAMC") in Los Angeles. He was prescribed Stelazine which removed the symptoms of his psychiatric problems.

4. Gene Tortuya was hospitalized on two occasions. In July 1984, he voluntarily admitted himself to the Palo Alto VAMC psychiatric unit for approximately two weeks. This admission occurred during a time period of multiple shift changes in employment for Mr. Tortuya, including a change from the graveyard to swing shift. He reported hallucinations and communicated his thoughts about suicide. His illness, diagnosed as an atypical psychosis with depressive features, responded to medication intervention. He was stabilized on three medications: an antipsychotic medication, Perphenazine

(aka Trilafon[1]), an antidepressant medication, Tofranil (aka Imipramine) and, to address the side effects of these medications, Benztropine (aka Cogentin). Seven months later, Mr. Tortuya was admitted to the Palo Alto VAMC on an inpatient basis, after he was placed by police in the Peninsula Hospital for 72 hours psychiatric observation because of his suicidal threats. He became suicidal after an incident at his job for United Airlines. He told co-workers that he would kill himself if he lost his job. He remained at the VAMC for 7 weeks.

5. Thereafter, Mr. Tortuya appeared at the Palo Alto VA Mental

---

[1] Each drug has a chemical name and a brand name, which are often used interchangeably. For convenience in these Findings, the medications will be referred to by brand name, e.g., Trilafon.

Hygiene Clinic ("Clinic") for medication refills. He did not communicate or indicate any further suicidal thoughts to anyone after his 1985 inpatient incident. At no time had he ever attempted suicide.

6. William K. Wittner, M.D., a staff psychiatrist and Clinical Associate Professor at Stanford University, first saw Mr. Tortuya on one of his visits to the Clinic for a medication refill. Mr. Tortuya failed to appear for his scheduled appointments at the psychiatric medication clinic, and later came to the clinic without an appointment for medication refills. He was referred to Dr. Wittner. Dr. Wittner maintained Mr. Tortuya on the same combination of Trilafon, Imipramine, and Cogentin prescribed earlier. Mr. Tortuya remained

relatively symptom free until 1989.

7. On June 14, 1989, Mr. Tortuya came with his wife for an unscheduled clinic appointment and, because Dr. Wittner was not present, consulted another staff psychiatrist, George D. Gulevich, M.D. Dr. Gulevich is a Professor, Department of Psychiatry and Behavioral Sciences, Stanford University School of Medicine and, at that time, had been the Chief of the Clinic for 10 years. Dr. Gulevich's notes from that visit, which he testified he made that same day, are as follows:

> Drop-in MHC [mental health clinic]. Patient and wife came in. Patient looks disheveled and fatigued, has not been sleeping for past three days, is getting disorganized, unable to go to work. Wife states this was the way patient's last decompensation began.
>
> Treatment. Excused medically from work until 6/19. Benadryl, 50 milligrams h.s. fat bedtime) for four nights. Increase Trilafon to 5 tablets (from 4) at bedtime.

Return as necessary, if needs to, before next appointment.

Defendant's Exhibits A, Q.

8. Dr. Gulevich asked Mr. Tortuya broad questions of the kind that usually elicit calls for help: how he was, what the problem was, and why he had come into the Clinic that day. The visit lasted approximately 25 minutes. Dr. Gulevich testified that neither Mr. Tortuya nor his wife requested hospitalization and, if they had, he would have noted the request, considered it and discussed it with them. Dr. Gulevich concluded that Mr. Tortuya was not suicidal or in a crisis, and did not seem likely to harm himself.

Dr. Gulevich addressed Mr. Tortuya's symptoms in two ways. First, he prescribed a small dose of Benadryl to help him sleep. Second, Dr. Gulevich prescribed a slight increase in Mr.

Tortuya's bedtime dose of Trilafon, the antipsychotic medication. In addition, Dr. Gulevich told Mr. Tortuya to return soon to consult with Tortuya's regular doctor, Dr. Wittner. Dr. Gulevich gave Tortuya an excuse from work until Monday, June 19, 1989, and prescribed Benadryl for four nights, through the following Saturday night.

9. On June 19, 1989, Mr. Tortuya returned to the Clinic and consulted with Dr. Wittner for approximately 15 to 25 minutes. Dr. Wittner testified that he asked Mr. Tortuya general questions to elicit information about what was bothering him. Dr. Wittner also testified that it was not his practice to repeatedly ask a patient if he was contemplating suicide, as such a practice suggested to the patient that suicidal thoughts were expected of him.

Wittner's notes from that visit, written contemporaneously with the visit, are as follows:

> [Subjective] - I still can't sleep. I did better with the Benadryl; I ran out.
> [Objective] - Tired. No longer disheveled. Rational.
> [Assessment] - Doing acceptably well, except for insomnia. No side effects, but maybe reported "nervousness" is.
> [Plan] - Will change Imipramine to the more sedating Elavil.
> [Prescription]
> Return to Clinic July 14

Defendant's Exhibits A, Q.

10. Dr. Wittner found that Mr. Tortuya's condition had improved from that reflected by Dr. Gulevich's note of June 14, and that the patient appeared much as he usually had in his past visits with Dr. Wittner. Dr. Wittner addressed Mr. Tortuya's sleep problem in two ways: (1) by replacing his antidepressant Imipramine with the more

sedating antidepressant Elavil at the same dose and frequency; and (2) by continuing the prescription of Benadryl in the same dose as prescribed by Dr. Gulevich. Dr. Wittner continued Mr. Tortuya's regular prescriptions for Trilafon and Cogentin.

Dr. Wittner wrote a note excusing Mr. Tortuya from work until June 21, 1989. Dr. Wittner scheduled his next appointment on July 14, and told him to call or return to the clinic before then if he needed to.

Dr. Wittner, Mr. Tortuya's treating psychiatrist for over three years, found that there were no indications during his June 19, 1989, office visit that Mr. Tortuya was considering suicide or that he was confused, disorganized, or suicidal, or intended to harm himself. Mrs. Tortuya believed that she had

warned both Dr. Gulevich and Dr. Wittner about Mr. Tortuya's past thoughts of suicide and requested hospitalization. In weighing the evidence, the court finds that Dr. Gulevich's and Dr. Wittner's recollections of the appointments are supported by both recollection and notes of the visit. Mrs. Tortuya's recollection is sincere but certainly affected by the gravity of the loss of her husband and not supported by any other witness or notes. Therefore, the court finds that the facts of the conversation of the visit are those reported by Drs. Gulevich and Wittner.

11. After his VAMC visit on June 19, 1989, Mr. Tortuya spent the rest of the day with his wife, Cresencia. She testified that they ate lunch in the Medical Center cafeteria, and her

husband drank coffee. She testified that he was rational for the rest of the day. He drove them in their van to Campbell, California, where they picked up a kitchen counter top and then took it to their house in San Bruno, where the carpenters were waiting to install it. Mrs. Tortuya testified that they went out for an early dinner at a fast food restaurant, Goldilocks, in Daly City, and arrived home early in the evening. She testified that "he was acting normal" throughout the day.

12. Mr. Tortuya took his medication at about p.m. Mrs. Tortuya testified that sh answered a telephone call from her husband's supervisor during the evening, and she heard Mr. Tortuya say that he planned to return to work the following day. As she watched television, he and his

mother-in-law, Mrs. Baticula, laughed and chatted about his plans for an upcoming summer vacation. He went to bed at approximately 9:00 p.m.

13. Cresencia Tortuya received her nurse's diploma in the Philippines, and has been a licensed registered nurse in California since 1975. In June 1989, she was working three days a week at Mills Hospital in San Mateo. Norman Tabachnick, M.D., the plaintiffs' own expert, testified that Mrs. Tortuya was a "qualified evaluator" of her husband's behavior. She neither observed nor heard anything on June 14 or June 19 that indicated to her that her husband would harm himself. She had no indication that Mr. Tortuya was contemplating suicide.

Lolita Baticula, the decedent's mother-in-law who lived in the Tortuyas'

house, testified that she had no indication Gene Tortuya was considering suicide. On June 19, "he expressed neither to me nor anyone else any suicidal thoughts or inclinations whatsoever." See Baticula Declaration, ¶11 (Defendant's Exhibit M). Similarly, the decedent's mother, plaintiff Cristeta Tortuya, testified that during her visit to the Tortuyas' home from June 6 to 17, 1989, she did not observe or hear anything that made her suspect that her son would harm himself. He never talked to her about suicide.

14. At 11:30 p.m. on the night of June 19, 1989, Mr. Tortuya left his bed, removed his gun from the closet, went into the bathroom, placed the loaded .22 caliber semi-automatic rifle in his mouth and pulled the trigger, killing himself.

15. Norman A. Tabachnick, M.D. testified that his standard for hospitalizing possibly suicidal patients was a feeling "that the patient's ability to hold back from being self-destructive is so diminished that the possibility of suicide is close and imminent." Although he testified that Dr. Wittner should have hospitalized Mr. Tortuya on June 19, Dr. Tabachnick based his opinion on Mr. Tortuya's sleep problem and reported nervousness on that date. The court declines to accept Dr. Tabachnick's opinion. Mr. Tortuya had reported these symptoms of sleep deprivation and anxiety to Dr. Wittner on occasions prior to June 1989 without incident. Dr. Tabachnick testified that Mr. Tortuya's suicide had all appearances of being an impulsive act, and that it did not appear that Tortuya

planned it prior to acting. Finally, although Dr. Tabachnick testified that a psychiatrist's history with a patient is an important factor in the psychiatrist's judgments about the patient, he formed his opinion without the knowledge of Dr. Wittner's three-year history with Mr. Tortuya.

16. Jerome A. Motto, the defendant's expert in psychiatry and suicidal states, testified that Dr. Gulevich's treatment on June 14 and Dr. Wittner's treatment on June 19 were within the standard of care, and that neither psychiatrist could or should have known that Mr. Tortuya was likely to commit suicide in the immediate future. In both instances, the psychiatrists appropriately evaluated the situation, addressed Mr. Tortuya's symptoms by slightly altering his

medications, intended to monitor his progress by scheduling another appointment, and invited Mr. Tortuya to return to the clinic as he needed to. The doctors had successfully maintained Mr. Tortuya on medications for over three years, and they had no reason to believe that the medications would not successfully resolve his symptoms in June 1989.

CONCLUSIONS OF LAW

1. The FTCA waives sovereign immunity only for claims against the United States for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ." 28 U.S.C. §1346(b) (emphasis added). The extent of the government's liability is to be determined under the same

principles as those applied to private persons. Moreover, under the FTCA, tort actions against the United States are governed by the "law of the place." Knagley v. United States, 788 F.2d 533 (9th Cir. 1986). Because the allegedly negligent conduct occurred in California, principles of California law apply.

The burden is imposed on the plaintiff, under California law, to establish a defendant's liability for negligence by proving a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury. United States Liability Ins. Co. v. Haidinger Hayes, Inc., 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770 (1970).

2. A psychiatrist's standard of

care for treating psychiatric patients on an outpatient basis is set forth in Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978). When a patient is under the care of a psychiatrist and the psychiatrist knows that his patient is "likely to attempt suicide," the psychiatrist has a duty to take preventative measures. Id. See also Jacoves v. United Merchandising Corp., 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468, 478-479 (1992) (reversed summary judgment, finding triable issue of fact as to whether defendants exercised "the reasonable degree of skill, knowledge, and care ordinarily exercised by medical care providers under similar circumstances in their professional community.")

The California Supreme Court has expressly rejected the notion that a

psychiatrist has an absolute affirmative duty to see that his patient does not harm himself. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 296 n.6, 253 Cal. Rptr. 97, 763 P.2d 948 (1988), cert. denied, 490 U.S. 1007 (1989).

> If such were the case, psychiatrists could be held responsible whenever one of their patients made the unfortunate decision to take his own life. We reject such a broad interpretation . . .

A psychiatrist's duty of care with respect to a patient seen on an outpatient basis is less than his or her duty of care with respect to a hospitalized or institutionalized patient. Bellah v. Greenson, supra, 81 Cal. App. 3d 614, 620, 146 Cal.Rptr. 535, 538 ("Obviously, the duty imposed upon those responsible for the care of a patient in an institutional setting

differs from that which may be involved in the case of a psychiatrist treating patients on an out-patient basis").

3. Plaintiffs failed to prove that Dr. Gulevich's treatment of Mr. Tortuya on June 14, 1989, either breached a duty of care or caused his death. Dr. Gulevich noted that Mr. Tortuya looked disheveled and fatigued, had not been sleeping for three days, was getting disorganized, and was unable to go to work. Accordingly, Dr. Gulevich instructed Mr. Tortuya to increase his bedtime dose of the antipsychotic medication, Trilafon, from four tablets to five. He addressed Mr. Tortuya's sleep problem by prescribing a moderate dose, 50 milligrams, of Benadryl at bedtime for four nights. Benadryl, a drug that Mr. Tortuya had used before and which can be purchased over the

counter, is often used for its side effects -- drowsiness. Dr. Gulevich told Mr. Tortuya to return to the clinic to see his regular doctor, Dr. Wittner, and he gave him an excuse from work until June 19. This treatment by Dr. Gulevich was thoughtful, rational, and well, within the standard of care.

4. Mr. Tortuya returned to the VAMC on June 19, 1989. At that time, it appeared that his condition had improved and he wanted to return to work. He advised Dr. Wittner that he had done better with the Benadryl, but had run out of the prescription. Dr. Gulevich's conduct on June 14, 1989, was within the standard of care and was not "a substantial factor in bringing about" Mr. Tortuya's death. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991) (a

"substantial factor" is one which is "so indispensable a cause that without it the result would not have followed").

Plaintiffs also failed to prove that Dr. Wittner's treatment of Mr. Tortuya on June 19, 1989, was outside the standard of care. Dr. Wittner assessed Mr. Tortuya's mental status on that date as not actively psychotic, not especially depressed, and not actively suicidal. Mr. Tortuya was hopeful, optimistic, and in touch with reality. Mr. Tortuya expressed readiness and desire to return to work on June 21. Mr. Tortuya demonstrated no objective signs during his visit with Dr. Wittner that he was likely to attempt suicide. Dr. Wittner did not know, nor should he have known, that Mr. Tortuya was likely to attempt suicide that evening. He owed no duty to Mr. Tortuya, therefore,

to take preventative measures against his suicide. See Bellah v. Greenson, supra, 81 Cal. App. 3d 614.

5. There was no evidence that Mr. Tortuya demonstrated suicidal tendencies to anyone on June 19, the date of his suicide. His wife, Cresencia, a licensed registered nurse, spent the entire day with her husband and neither observed nor heard anything that indicated to her that he would hurt himself. He never mentioned suicide to her in the four years before his death. She never considered on June 19 that he would hurt himself, and she did not observe that he was confused. Similarly, the decedent's mother-in-law, Lolita Baticula, who lived with him, testified that she had no indication Mr. Tortuya was considering harm to himself. Nor did the decedent's mother, Cristeta

Tortuya, who visited her son from June 6 to 17, 1989, have any such indication. In addition, Mr. Tortuya spoke to his supervisor on the evening of June 19 and assured him that he intended to return to work the next day. These facts support the finding and conclusion that Dr. Wittner did not know, and reasonably should not have known, that Mr. Tortuya was likely to attempt suicide on that date and, therefore, owed no duty to take preventative measures against his suicide.

6. Plaintiffs failed to establish that defendant breached a duty of care by prescribing new medications for Mr. Tortuya and negligently failed to monitor this medication change within a hospital setting. With respect to Dr. Gulevich's prescription of Benadryl on June 14, he prescribed a small dose

which, according to Mr. Tortuya, helped him to sleep. Dr. Tabachnick testified that Benadryl is a medication which can be purchased without prescription, and is routinely used to help persons sleep. The court concludes that this prescription was reasonable and thoughtful.

The court concludes that Dr. Wittner's prescription on June 19 of the antidepressant Elavil in place of the antidepressant Imipramine was reasonable. Testimony of Drs. Motto and Tabachnick established that Elavil and Imipramine are nearly identical medications chemically, pharmacologically, and physiologically. The primary variation is that Elavil is more sedative. Dr. Wittner substituted the same dose and frequency of Elavil for the Impramine to preserve the

antidepressant effect, and add more sedation.

The court concludes that Dr. Wittner was reasonable in his decision not to monitor this medication change to Elavil from Imipramine by placing Mr. Tortuya in a hospital setting. According to Dr. Wittner, Mr. Tortuya's condition had improved since June 14 and he wanted to return to work. Dr. Wittner's professional judgment, based upon his personal observations of Mr. Tortuya on June 19 and their long-term physician-patient relationship, was that Mr. Tortuya was in stable condition and hospitalization was not necessary. The court finds this judgment was reasonable at the time it was made. See Bellah v. Greenson, supra, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535, 538.

7. After evaluation of the

testimony of Drs. Wittner, Gulevich, and Motto, the court finds that Drs. Gulevich and Wittner maintained the standard of care and did not cause Mr. Tortuya's suicide by prescribing the respective medications 2 on June 14 and 19, 1989.

8. Dr. Tabachnick testified that not all suicides can be prevented, for even he had a patient who committed suicide. He also testified that Mr. Tortuya's suicide was an impulsive act, and that Mr. Tortuya probably did not consider harming himself until he decided, and implemented, his plan to kill himself. Moreover, Dr. Motto testified that Mr. Tortuya received optimal care from the VA and that his suicide occurred in spite of that care. Plaintiffs have not established that Dr. Wittner breached a duty owed to Mr.

Tortuya, or that, even if there was a breach, the breach was a "substantial factor" in bringing about Mr. Tortuya's impulsive act of suicide. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1054, 1 Cal. Rptr. 2d 913, 920, 819 P.2d 872 (1991).

9. Comparative negligence is the law in California, under which a proportional reduction in plaintiff's recovery is made. Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 829, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975). Mr. Tortuya gave his doctors no information in June 1989 about any new stressors in his life of any thoughts he may have had about harming himself. Similarly, his wife, with whom he had lived through prior crises requiring hospitalization in 1984 and 1985 and with whom he spent virtually all his time in the 10 days before his death, testified she did not

know of his suicidal intentions.

CONCLUSION

1. Plaintiffs have failed to meet their burden of proving negligence by defendant. Accordingly, judgment will be entered in favor of the defendant.

2. Any finding of fact or conclusion of law stated herein which may be considered to be the other is deemed to be such.

IT IS SO ORDERED.

Dated: 9/13/94

Barbara A. Caulfield
United States
District Judge

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and am not a party to this action. My business address is 500 Washington Street, 6th Floor, San Francisco, CA 94111. I am familiar with and have complied with my employer's practice for collection and processing of correspondence for mailing and for hand delivery.

As set forth below, I caused to be served on the parties in this action:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY; REQUEST FOR JUDICIAL NOTICE

This service was accomplished by placing true copies of such document in envelopes addressed to and served upon the following:

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COURT OF APPEALS
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Such service was accomplished by sending such document, on the date set forth below, via Federal Express overnight courier, for delivery by October 12, 1994.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on the date set forth below.

I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this declaration was executed on the date set forth below.

DATE: October 11, 1994

Janet Curley

JANET CURLEY